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**IN THE  
COURT OF APPEALS OF INDIANA**

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CHRISTOPHER VALDEZ,  
  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
  
Appellee-Plaintiff.

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No. 49A05-0609-CR-518

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Scott Devries, Commissioner  
Cause No. 49F15-0512-FD-214584

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**March 29, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Christopher Valdez appeals his conviction for Theft,<sup>1</sup> a class D felony. Specifically, Valdez claims that his conviction must be set aside because the trial court erred in refusing to appoint a public defender to represent him at trial and that the trial court did not adequately advise him of the hazards of proceeding pro se. Concluding that the trial court erred in refusing to appoint counsel for Valdez at public expense, we reverse and remand for a new trial.

### FACTS

On December 11, 2005, the State charged Valdez with one count of theft for stealing car stereo equipment from an Indianapolis Meijer Store. At Valdez's initial hearing that commenced two days later, the trial court determined that Valdez was not indigent because he lived with his girlfriend, was employed at a grocery store, and earned less than \$250 per week.<sup>2</sup>

Thereafter, on April 4, 2006, the trial court granted Valdez's motion for a continuance for one month to provide him the opportunity to retain an attorney. At the next pre-trial conference on May 9, 2006, the trial court questioned Valdez regarding his lack of representation by counsel. Valdez stated that he was earning less than \$250 per week at Arthur's Market in New Palestine and that he had not been able to save any money. He stated that he spent approximately \$80 per week on food and items for the house and was not

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<sup>1</sup> Ind. Code § 35-43-4-2.

<sup>2</sup> We have not been presented with a transcript of the trial court's initial determination of Valdez's nonindigency. However, as discussed below, the trial court made clear at the pretrial conference the economic factors upon which it relied when it refused to appoint counsel for Valdez at public expense.

paying any rent. Valdez also stated that he had purchased an automobile for \$100 in January but that it did not run. Thereafter, Valdez purchased a 1995 Dodge Neon automobile in February, and had been paying someone on a weekly basis for clutch and transmission repairs. As a result, the trial court suggested that Valdez sell the vehicle to hire an attorney and take the bus to and from work. In response, Valdez remarked that he could not take a bus because his job was in New Palestine and he needed transportation to and from work while his boss and her daughter were on vacation.

The following exchange then occurred between Valdez and the trial court:

COURT: Do you understand, has anyone forced you or threatened you in any way to decide to proceed on your own?

VALDEZ: No.

COURT: Okay. Has anyone offered you anything to do it?

VALDEZ: No.

COURT: Okay, this is something that you're deciding to do, correct?

VALDEZ: Something I am forced to decide to do?

COURT: Because you decided not to save the money for an attorney.

VALDEZ: That was not a decision I made.

COURT: Okay, clearly it is because you disregarded all that so I am not going to argue with you about that. The fact that you're deciding not to spend money on an attorney but to spend it on other things doesn't mean we're going to appoint somebody for you or let this case linger on forever. You're the one who has decided to spend the money elsewhere and not [hire] an attorney. So, I'm not going to keep going another six months and have you come back and say that you spent it on a car or you spent it on this or spent it on that. I'm not going to do that. We're not going to let this case linger because you're

deciding to spend your money on other things. You've had the money but decided to spend it elsewhere. I'm not going to let this linger on. Doesn't make any sense. Do you understand that?

VALDEZ: I understand it.

COURT: Do you understand that an intentional delay, if it seems like, if it comes across as an intentional delay, that could actually even affect your release conditions, do you understand that?

VALDEZ: I understand.

COURT: Okay. So, to the Court, this is your decision to do this. I mean this has been your decision to proceed and the Court's even told you that if you don't hire somebody by today, you have to proceed on your own. And you haven't even come back with proof that you've even talked to anybody.

VALDEZ: Well, I was actually...

COURT: I'm not asking you a question. I'm telling you, you haven't come back with any proof of even talking to somebody. All right, the defendant [is] proceeding on his own.

...

COURT: How much did that first car cost you?

VALDEZ: A hundred.

Tr. p. 8-11.

At a bench trial that commenced on July 11, 2006, Valdez proceeded pro se. After the State presented its case-in-chief, the trial court instructed Valdez as follows: "Okay, Mr. Valdez, keep in mind you first have to ask yourself a question and then answer it because you have to give the State an opportunity to object, if appropriate." Id. at 36. As a result, Valdez's case-in-chief is peppered with exchanges like the following:

MR. VALDEZ: Okay. Christopher Valdez, were you in the office at the same time that the money was returned to whoever it was returned to?

A: Yes, I was and I witnessed the Meijer security return the money from the stolen items to Christopher Flanigan and then Christopher Flanigan then handed part of the money that [Mr.] Phon paid for the items to Phon. And they agreed on splitting the money that, I did not receive any money.

Id. at 38. At some point, Valdez began to testify in narrative form.<sup>3</sup> The trial court immediately interrupted and stated, “Sir, sir, sir, you need to ask yourself a question, okay? You can’t just make commentary like that.” Id. At the conclusion of the trial, Valdez was found guilty as charged. Valdez then informed the trial court that he could not afford counsel because he had not “had a job for the last two months.” Id. at 55. As a result, the trial court appointed a public defender to represent Valdez at sentencing and on appeal.

### DISCUSSION AND DECISION

In addressing Valdez’s claim that his conviction must be reversed, we note that the Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the assistance of counsel. Dobbins v. State, 721 N.E.2d 867, 871 (Ind. 1999). This right includes the right of an indigent defendant in a criminal prosecution to have counsel provided for him at state expense. Moore v. State, 401 N.E.2d 676, 678 (Ind. 1980); Ind. Code § 35-33-7-6(a). Indeed, our Supreme Court has observed that “of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects

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<sup>3</sup> Although it is within the trial court's discretion whether to permit a witness to testify in narrative form, see Hedges v. State, 443 N.E.2d 62, 66 (Ind. 1981), we see little value in the trial court’s charge to Valdez that he was first required to ask himself a question and then answer it. In our view, such a practice is of little value and amounts to a needless expenditure of time and resources. Under these circumstances, it was quite

his ability to assert any other rights he may have.” Poynter v. State, 749 N.E.2d 1122, 1125-26 (Ind. 2001) (quoting United States v. Cronin, 466 U.S. 648, 654 (1984)).

In general, the trial court has discretion to determine whether a defendant is indigent, and we are reluctant to override that discretion. Redmond v. State, 518 N.E.2d 1095, 1095 (Ind. 1988). While no specific monetary guideline determines a defendant’s indigency, “[t]he determination as to the defendant’s indigency is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant’s total financial picture as is practical.” Id. The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of the defendant’s disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations. Id. Also, the defendant does not have to be totally without means to be entitled to counsel. If he legitimately lacks the financial resources to employ an attorney, without imposing a substantial hardship on himself or his family, the court must appoint counsel to defend him. Id.

We also note that implicit in the Sixth Amendment right to counsel is the accused’s right to represent himself. Faretta v. California, 422 U.S. 806, 819 (1975). However, a defendant who represents himself “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his

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reasonable for Valdez to testify in a manner that was not hampered by the traditional question and answer format.

choice is made with eyes open.” Id. at 835. Because the “average defendant does not have the professional legal skills to protect himself” at trial, a defendant’s choice to appear without counsel must be made voluntarily. Hofferth v. State, 856 N.E.2d 137, 141 (Ind. Ct. App. 2006) (quoting Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938)).

In Poynter, our Supreme Court observed that:

[t]rial courts need not necessarily appoint counsel for every defendant who fails to implement an intention to employ counsel, nor need they unreasonably indulge a defendant who repeatedly fails to cooperate with appointed counsel, but the importance of the right to counsel cautions that trial courts should at a minimum reasonably inform such defendants of the dangers and disadvantages of proceeding without counsel. The appellate court is to consider whether the defendant voluntarily, either verbally or by conduct, chose self-representation, and whether in so choosing the defendant made a knowing and intelligent waiver of the Sixth Amendment right to counsel.

749 N.E.2d at 1129.

In Redmond, our Supreme Court in 1988 determined that the trial court erred in refusing to appoint counsel for a defendant making \$150 per week and who had been unable to retain counsel over a ten-month period. In particular, the Redmond court observed that:

Although we are reluctant to override a trial court’s discretion in a matter of this kind, and although the trial judge showed great patience in giving appellant every opportunity to employ counsel, we nevertheless feel that when the record is examined it becomes apparent that appellant’s expectation of being able to employ counsel of his own choosing was unrealistic. We find that the trial court should have appointed counsel to represent appellant in his defense.

518 N.E.2d at 1096.

In this case, Valdez testified at the pretrial hearing that he made less than \$250 per week<sup>4</sup> and had purchased a vehicle in January that did not run. Id. at 8, 11. While Valdez did not pay rent, he contributed \$80 per week for food and household living expenses. Tr. p. 5. The uncontradicted evidence also established that Valdez purchased a second automobile in February, and had been paying an individual on a weekly basis for vehicle repairs to that vehicle. Id. at 6-7. Although the trial court suggested that Valdez should sell his vehicle, hire an attorney, and ride the bus to and from work, Valdez testified that his job was in New Palestine and that he needed his own transportation while his supervisor was on vacation. Id.

In our view, Valdez's statements about his income and the ways in which he spent it were not disproved and do not appear incredible. And, as noted above, Valdez informed the trial court after being found guilty that he had not been employed for two months. Id. at 55. Again, while we are reluctant to override a trial court's determination of a criminal defendant's indigency, it is apparent to us that Valdez lacked the resources to employ an attorney. In short, ordering Valdez to retain private counsel in his circumstances would, indeed, result in substantial financial hardship to him. Thus, the trial court erred in refusing to appoint trial counsel for Valdez.

Reversed and remanded for a new trial.<sup>5</sup>

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<sup>4</sup> When Valdez was working in 2006, the state and federal minimum wage was \$5.15 per hour. <http://www.dol.gov> (last visited Mar. 9, 2007). There is no evidence establishing that Valdez worked a forty-hour week or that Valdez's hourly income rate took into account deductions, including the payment of federal, state, or social security tax. The 2006 poverty income level for a one-person household was \$9800, and for a two-person household, the level was \$13,200. <http://aspe.hhs.gov/poverty/06poverty.shtml>.

<sup>5</sup> Inasmuch as we are reversing for the reasons set forth above, we need not decide whether the trial court adequately advised Valdez of the hazards of proceeding pro se.



DARDEN, J., and ROBB, J., concur.